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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

STANDARD OIL COMPANY OF NEW JERSEY, as owner, etc. of the Steamship *Llama*, Petitioner, *against* THE UNITED STATES OF AMERICA.	No. 169.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONER

STATEMENT OF CASE.

On May 5, 1919 the Petitioner, Standard Oil Company of New Jersey, as owner, etc. of the Steamship *Llama,* filed a libel in Admiralty in the District Court for the District of New Jersey under the Act of Congress of September 2nd, 1914 entitled, *"An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department."*

This Act by Section 5 expressly conferred jurisdiction of the controversy on the District Court sitting in Admiralty.

The case came on to be heard in the District Court for the District of New Jersey before Judge Lynch, who entered a Final Decree in favor of the Petitioner against the United States in the sum of $220,105.73. Pp. 111-113.

The opinion of Judge Lynch will be found at pp. 106-110 of the Record.

From this final decree the United States filed an appeal to the United States Circuit Court of Appeals for the Third Circuit.

On July 6, 1923 a majority of that Court, (Buffington, C. J., and McKeehan, D. J.), rendered an opinion remanding the case to the District Court with directions to vacate the decree and dismiss the libel. Pp. 178-183. Davis, C. J. filed a dissenting opinion. Pp. 183-186.

Of the four judges who have heard the case, two have been for the Petitioner and two for the United States.

The libel stated two causes of action based upon two separate policies of war risk insurance issued by the War Risk Bureau of the Treasury Department on October 8, and October 16, 1915, respectively, to the Petitioner, on the hull and freight of the Steamship *Llama* covering a voyage from New York to Copenhagen via Kirkwall.

The steamer became a total loss in the course of the voyage insured against while being taken into Kirkwall

by a British Prize crew placed on board by a British cruiser.

The perils insured against were alike in both policies. The clause enumerating them, reads, pp. 122, 125, (italics ours):

> "Touching the adventures and perils which the insurer is contented to bear, and does take upon itself, they are the men-of-war, letters of marque and countermarque, surprisals, *takings at sea, arrests, restraints and detainments of all kings, princes, and peoples of what nation, condition, or quality soever, and all consequences of hostilities or warlike operations,* whether before or after declarations of war."

The policies contained the usual sue and labor clause. Pp. 122, 125.

The District Court held that there had been a loss by *"taking at sea, arrest, restraint and consequences of hostilities within the meaning of the policy."*

Judge Lynch thus stated his conclusion, p. 110:

> "There was no time when the shipmaster was left to navigate the ship in his own way; she was lost while he was doing what he had to do.
>
> "The *Llama* was all the time in the grip of the captor and of its armed representatives, whose control never ceased, but efficiently caused the loss. After the seizure the adventure of taking the ship into Kirkwall was that of British naval authorities, and the risk and responsibility of it was theirs."

The District Court found that the final course through the Westray Firth when the ship went on a rock was selected solely by the British Naval officer. P. 108.

Davis, C. J., in his dissenting opinion in the Circuit Court of Appeals agreed with this conclusion. Pp. 185-186.

The majority opinion of the Circuit Court of Appeals took the view that the loss of the ship could not be considered a war risk because although the master and the crew of the steamer were under the Prize Officer's orders, the Prize Officer was not personally navigating the ship through the Westray Firth at the time of the stranding, although he had approved the course, and he and the master had considered it safe. P. 182.

The Record shows that the Prize Officer, Cox, five minutes before the stranding had actually "suggested" that the captain change the course, which the captain did. *Cox*, p. 70.

The Circuit Court of Appeals in summarizing its decision said, p. 182:

> "The stranding was the dominate causal factor of the loss; and that stranding, if the contemporaneous evidence as to the loss be accepted, resulted from the conjoint, but mistaken, navigation of the captain and the British officer."

All the testimony in the case was taken by deposition.

The important conflict in the evidence on which the District Court found one way, and the majority of the Circuit Court of Appeals the other, was whether the final course through the Westray Firth when the ship went

on the rocks was selected solely by the British prize officer, or was selected jointly by the British prize officer and the master of the *Llama.*

Even if the view of the Circuit Court of Appeals is adopted, this does not decide the vital issue as to which of the two men was *in control* of the ship at the time and legally chargeable with responsibility for the disaster, and whether there was a *"taking at sea, arrest, restraint and detainment"* within the meaning of the policy.

The material testimony with respect to the occurrences involved in this controversy is contained in the depositions of the following witnesses:

Clinch, former master of the *Llama,* called by the Petitioner. Pp. 37-63.

Jensen, former third officer of the *Llama,* called by the Petitioner, pp. 16-36, who at the time he was examined was a Naval Officer of the United States, attached to the United States Transport *Agamemnon* as Chief Officer. P. 25.

Lieutenant Cox, the British Naval Officer, who was engaged in taking the *Llama* into Kirkwall, called by the United States. Pp. 63-86.

Facts.

The Tanker *Llama,* owned by the Petitioner, sailed from New York on October 14, 1915 bound for Copenhagen, via Kirkwall. *Clinch,* pp. 37, 38. When about 400 miles west of the Orkney Islands she was stopped by the British Cruiser *Virginia* and boarded by a British prize crew, consisting of a naval lieutenant and four armed men. *Cox,* pp. 65, 77. *Clinch,* p. 38.

The Prize Officer examined the ship's papers and manifest which showed the ship was bound for Copenhagen via Kirkwall. *Cox,* pp. 65, 79.

Cox thereupon signaled to the British Cruiser the result of his investigation which was apparently unsatisfactory, and Cox was given orders to proceed with the ship to Kirkwall. *Cox,* pp. 65, 79.

Cox stationed his armed men at convenient places about the ship to see that his orders were carried out. He had an armed man on the bridge at all times. *Cox,* pp. 66, 67, 79.

Cox describes the circumstances of his boarding of the *Llama* as follows, p. 65 (Italics ours):

> "Q. Now, Lieutenant, just tell us exactly what took place when you came aboard—where you boarded, whom you saw, whom you spoke to and what was said.
>
> A. I boarded her on the port side just below the bridge, and I was met on the deck when I boarded by an officer.
>
> Q. Do you know which one it was?
>
> A. I could not tell you.
>
> Q. It is immaterial?
>
> A. Then I was taken to the captain, who, to the best of my recollection, was on the bridge. We then went in the cabin and went over his papers; that is, the ship's papers and manifest. *I then went on the bridge and signalled my investigation to the cruiser, who gave me orders to proceed with the ship to Kirkwall.*
>
> Q. *Were any directions given you then as to any course, or where you were to proceed to?*
>
> A. *It was sent by semaphore.*

Q. Did you read the semaphore yourself?

A. *I personally read the semaphore myself.*

Q. *Tell what was the message as near as you recollect it?*

A. As near as I recollect it, it was: *'Proceed to Kirkwall; keeping to the northward of Scule Skerry and North Rona'.* I think those two places were the other way round if I recall it to mind. *'You are not to pass between the islands during the hours of darkness.'*

* * *

Q. Now, after the message had been passed between the *Virginian* and yourself, what next followed?

A. I turned to the captain who was on the bridge and we went into the chart house, as near as I can remember; *and I told him that orders had come through as to the course to steer.*

Q. *What was that?*

A. *It was to keep northward of these two islands.*

Q. *What islands?*

A. *Scule Skerry and North Rona, and I asked him if he would navigate the ship, to which he replied that he would. The captain then laid off the course as near as I can remember to Noup Head; and then he gave the order to—asked me, rather, if he could proceed; so I said 'yes'; and he gave the order, 'Full speed ahead' and set the course.*

Q. Who laid off the course on the chart?

A. The captain.

Q. Who gave the directions for setting it?

A. The captain.

Q. State whether or not you took any part whatever in the navigation of the ship on that course.

* * * * * *

Q. Answer the question.

A. I took no part in laying the course off; *the only part I took was in looking after it afterwards to see that it complied with my orders from my captain.*

Q. *And that was what?*

A. *That was to pass to the northward of North Rona and Scule Skerry.* The course did that and so I never mentioned it again."

Thus the *Llama* had been placed under *arrest, seizure, restraint,* and *detainment* within the meaning of the risks insured against in the policies, by being first stopped by a British war-vessel, which placed on board her a British naval officer and four armed men, who took possession and control of the vessel, and compelled the captain to proceed to Kirkwall by a specific course, and forbade him to pass through the Islands during the night. The control of the voyage at the very outset was taken out of the hands of the master of the *Llama,* who was rendered subservient to the orders of the British naval lieutenant.

In practically an identical case in which the Circuit Court of Appeals for the Second Circuit reached the directly opposite result from the court below, *Hough,* C. J., describing a precisely similar situation, in *Muller* v. *Insurance Companies,* C. C. A. 2nd Circ., 246 Fed. 759, 762, said:

"That the *Canadia* and her cargo was seized, arrested and detained within the meaning of the policy we think too plain to require more than mention."

The testimony of Lieutenant Cox clearly shows that after he had directed the initial course laid out after leaving the cruiser he checked the course on the chart *"to see that it complied with my orders from my captain"*. *Cox*, p. 66.

Cox further testified that the captain later approached him and asked his *"permission"* to proceed through the Westray Firth, and that he gave his *"consent"* to go through that passage. *Cox*, p. 73.

If Lieutenant Cox was not in supreme control of the vessel with its captain subservient to him, it is a little difficult to understand why the captain should have to ask his *"permission"* to proceed through the Westray Firth, and why Cox should give his *"consent"* to do so. This incident demonstrates very forcibly the dominion that Cox had assumed over the vessel and its captain.

At page 82 of the Record Cox testified as follows with respect to how the ship was navigated from the time he boarded her until the vessel stranded (Italics ours):

"Q. Were you present with the captain in the chart room when he was laying down these courses?

A. Not the first course.

Q. That is the course to the north of Scule Skerry?

A. Yes.

Q. *You told him about that course?*

A. *I told him what we had got to do.*

Q. *And he showed you the course afterwards?*

A. *Yes, I went out to see our ship in case there were any more signals coming there and he showed me the course afterwards.*

Q. *And you approved it?*

A. *Yes.*

Q. So that when he was laying down that course you were with him in his chart room?

A. Sometimes I was with him and sometimes I was out on the bridge.

Q. *At all times before acting upon any course which he had laid down tentatively he would tell you what he had done?*

A. *He had sometimes altered his course first and told me afterwards.*

Q. *Told you immediately afterwards?*

A. *Yes, within a short time afterwards.*

Q. *Before the course had been departed from materially?*

A. *Yes.*

Q. *It is the fact, is not it, that the captain always reported to you what he was doing until the time of the stranding?*

A. *Yes.*

Q. *Did you at any time suggest changes?*

A. *No, only the one time when I sighted this wash ahead.*

Q. *You had told him what your general instructions were?*

A. *I told him what the general instructions were.*

Q. *And he laid down these courses?*

A. *Yes.*

Q. *Showed them to you and you approved them?*

A. *Yes.*

Q. *And then he carried them out?*

A. *Yes.*"

The foregoing testimony amounts to this:

The general directions as to courses were given by Cox to the master. The master thereupon worked out the details in accordance with Cox's general instructions and submitted them to Cox for his approval which in each case was given.

In such a situation can there be any question as to who was in control of the ship?

Lieutenant Cox furthermore admitted with obvious reluctance that it was his duty to take the *Llama* to Kirkwall "*by the safest route*" and "*with all despatch*", and that his orders from the British Government were to the effect that the "*master should be given a special route to be followed, but not to interfere with the details of navigation unless necessary.*" *Cox*, pp. 78, 92.

Lieutenant Cox also testified that he realized that the *Llama* might be the subject of prize court proceedings, and that he was representing the interests of the British Government at least to the extent "*that I am to see that she (The Llama) gets to Kirkwall.*" *Cox*, p. 78.

At pages 77-79 Cox thus described his conception of his position aboard the ship:

"186 Q. Now when you boarded any vessel for the purpose of taking her in for examination you

realized, I take it, that you were boarding a vessel that might possibly after examination at Kirkwall be the subject of prize court proceedings?

A. Yes.

187 Q. And that she might possibly be condemned as good prize?

A. Yes.

188 Q. So that you realized when you boarded any such vessel that you were representing the interests of your Government, whatever they might prove to be, in that particular vessel?

A. Yes.

189. Q. I do not know the value of the *Llama;* but, assuming she was worth, say, half a million dollars, or a million dollars, you would then realize that on boarding the *Llama* you were representing the interests of your Government, whatever they might be, in a vessel of considerable value?

Mr. Staley: This is objected to; the man was boarding under naval orders.

A. To the extent that I am to see that she gets to Kirkwall.

Mr. Symmers: Yes, you understand it was part of your duty to see that she got there?

A. Yes.

190 Q. And it was part of your duty in answering the interests of your Government to see that she got there, if possible, by the safest route?

A. By the safest route, yes.

191 Q. And in view of the presence of submarines in all quarters, especially where they were not expected to be, you recognized the importance of getting every vessel that you boarded in as quickly as possible?

Mr. Staley: Is that prior to this time or subsequent to this time?

Mr. Symmers: Both prior and subsequent and at this time?

A. Yes, to get them in with all despatch.

192 Q. You did not regard yourself as merely a passenger on board this ship, did you?

A. I did as far as the navigation of the ship went.

193 Q. Oh, of course; but suppose a captain had suggested a course that did not meet with your approval, you assume yourself to have power to correct it?

A. Yes.

194 Q. That was one of the purposes of being armed, was not it; to compel the masters to do whatever you thought fit to make them do?

A. Only to a certain extent. If his course would take him to Kirkwall he could take that course, provided it was not against direct orders from the Government.

195 Q. Suppose upon being boarded he had said: 'I do not want to go into Kirkwall with you; I am going to turn back and go to where I came from,' what would you have done?

A. I should have informed the cruiser.

196Q. And what would have been the custom of the cruiser?

A. That I cannot tell you.

197 Q. But, to the extent of your power, you had instructions to take him into Kirkwall, and to the extent of your power you would have obeyed those instructions?

A. Yes.

198 Q. And you had four or five armed men to assist you in that?

A. Yes.

199 Q. Were any of the crew or any of the officers of the *Llama* armed, as far as you had any information?

A. Not as far as I know.

200Q. They complied with your requests or orders or direction, or whatever you choose to call them?

A. Yes.

201. Q. They gave you no opposition?

A. They gave me no opposition, no.

202 Q. You told the master you had these orders to take him into Kirkwall?

A. I said he had to proceed to Kirkwall."

In considering Cox's evidence it should be borne in mind that Captain Clinch testified that he had not intended to go through the Westray Firth passage but was planning to use the Fair Island passage to the north of the Orkneys which was longer but as safe as the Atlantic Ocean. *Clinch,* p. 39. Cox, however, insisted on the Westray passage. *Clinch,* p. 39.

The steamer proceeded on her way towards Kirkwall and in accordance with the cruiser's order to Lieutenant Cox *"not to pass through the islands during the hours of darkness"*, which order Cox communicated to the master, the *Llama* lay off the entrance to the Westray Firth during the night of October 30th.

On the next morning, the *Llama* commenced her fatal trip through the Westray Firth.

Cox testified that shortly before the stranding while going through Westray Firth he went on the bridge and had a look around; that he then went into the chart room where the captain was, was shown the position of the ship by the captain and had a few words with the captain about the course he was steering. *Cox,* p. 69.

With respect to what then followed, Lieutenant Cox, at pages 69, 70, gave the following very significant testimony (Italics ours):

> "A. And then I went out on the bridge again and saw breakers on the port bow.
>
> Q. How much on the port bow?
>
> A. I should say about a point and half a point.
>
> Q. And how far distant about?
>
> A. One to two miles, I should think.
>
> Q. Go on.
>
> A. *I then went into the chart room again and told him what I had seen and suggested that he had better take steps to clear it, which he immediately went out and did.*"

About five minutes thereafter the steamer struck a submerged reef and stranded and became a total loss. P. 22.

It will be observed from the testimony just quoted that Lieutenant Cox says he "*suggested*" to the captain to make the final change in the course before the vessel went on the rocks. But in view of Cox's position aboard the ship, it can scarcely be contended that Cox's "suggestion" could be regarded in any other light than an absolute order.

As Davis, C. J., pointed out in his dissenting opinion, p. 186:

> "There is no question about the fact that Lieutenant Cox was the absolute master of the vessel. He admits it, and everybody on the vessel knew it."

In connection with Lieutenant Cox's testimony that he *"suggested"* that the captain change to the final course, the evidence of Jensen, the third officer, is important.

As has been already mentioned, Jensen, when examined as a witness, was a United States naval officer attached to the United States Transport *Agamemnon.* If he had any incentive to color the truth it certainly would be in favor of the United States, his employer. Such an idea, however, would hardly occur to a United States naval officer. At page 22 Jensen testified:

> "Between the time of change of course and stranding I saw breakers on the port bow close aboard. The fact of seeing these breakers naturally aroused my curiosity and also made me entertain a certain amount of doubt if we would clear them or not. I notified the prize officer in person about these breakers that seemed to me to be rather close on the course we were on. I asked him his opinion about being on a safe course to pass these breakers. He assured me we were. Because of the fact that my duty kept me on the bridge all the time I had no access to the chart and presuming that the prize officer was naturally acquainted with the waters in this locality, I requested him to inform me of the name of this reef. He said he was not sure of the name."

Furthermore, Jensen very positively testified, as did the captain, that the final change of course was made by the Prize Officer and not by the captain.

The District Court found that after the seizure and at the time of the stranding the vessel was being navigated solely by the British Naval Officer or under his direction.

With this conclusion, Davis, C. J. in his dissenting opinion below expressed concurrence. P. 186.

The majority opinion of the Circuit Court of Appeals held that the final course through the Westray Firth was not selected solely by the naval lieutenant, but was the result of the conjoint but mistaken, judgment of the British Naval Officer and the Master.

Judge Buffington (p. 182) writing for the majority, stated their finding as follows:

> "The stranding was the dominant causal factor of the loss; and that stranding, if the contemporaneous evidence as to the loss be accepted, resulted from the conjoint, but mistaken, navigation of the captain and the British Officer."

This finding was undoubtedly due to the statement of Captain Clinch made before the American Consul at Dundee in his extended protest in which he stated that when the vessel stranded "the vessel was holding a course south magnetic, which was considered safe by the master and by the Naval Officer in charge of the prize crew." P. 148.

The finding, however, wholly disregards the fact that Cox testified that he "*suggested*" the change of course to the captain and the captain immediately carried it out. Cf. *Cox's* testimony p. 70.

Whether the captain considered the course safe or not, the fact remains that the course was "*suggested*" by Cox who was in control of the vessel.

It is impossible to understand how the voyage after the seizure by the prize crew became any less the adventure of a belligerent government because the master and the prize officer made a conjoint mistake as to the safety of the course. The real test in the last analysis would seem to be who was the supreme master of the vessel.

Either the prize officer was aboard the *Llama* with his four armed men as the representative of the British Government to take the vessel into Kirkwall at all costs, as Lieutenant Cox has testified, or Lieutenant Cox and his four armed men were on board the *Llama* as passengers, merely for the pleasure of the ride.

In performing his admitted duty of "*seeing that the ship gets to Kirkwall*" "*by the safest route*" and "*with all despatch*" on a course "*keeping to the northward of Scule Skelly and North Rona*", it was of course impossible for Lieutenant Cox personally to run the engines, steer the ship, keep the watches, cook the meals for the crew and for himself and personally perform the other duties necessary to take the ship into Kirkwall. He had either to put on an entirely new crew or make use of the men he found on board.

But the fact remains that the prize officer's orders or "suggestions", whether they took the form of positive or negative direction or acquiescence in some act that the master or engineer or other member of the crew was performing, were supreme and recognized as such. They were backed by armed force.

As Davis, J., pointed out in his dissenting opinion in the Circuit Court of Appeals:

> "Lieutenant Cox was the absolute master of the vessel."

The majority opinion of the Circuit Court of Appeals stated its conclusion as follows:

> "The view we have taken of the situation, namely: that the libelant has not satisfied us that the *Llama* was being navigated by the British officer when she stranded, renders it needless to refer to all the authorities cited, all of which have had our careful attention."

It seems to us, with all respect, that the court below completely missed the point.

The determining factor cannot be whether Lieutenant Cox was personally conducting the details of the navigation. The true test is who was in control of the vessel from the time of the arrest, seizure and detention. If Lieutenant Cox chose either from necessity or otherwise to use the owner's master and engineers for his own purposes, the responsibility still remained his. If the owner's entire crew had been taken off and a British naval crew put aboard there could be no doubt that Cox

would be responsible for his subordinates. What possible difference can it make in principle that Cox chose to use the owner's master and crew as his subordinates?

What happened here was exactly what happened in *Muller* v. *Insurance Companies,* C. C. A. 246 Fed. 759.

In that case the British naval officer and the master of the *Canadia,* which was similarly being taken into Kirkwall, "*consulted*" as to the course and made a joint miscalculation of about twelve miles, with the result that the vessel ran ashore and was a total loss.

The loss was held to be a war risk.

It is, of course, obvious that the hazard of a marine underwriter on a vessel in charge of an experienced master becomes a very different risk after a belligerent places over that master a young naval lieutenant, twenty-two years old, with authority and power to dictate with respect to the movements of the vessel, for the purpose of taking the vessel into a belligerent port.

In fact, it must be obvious that a shipmaster, who is obliged to proceed to a certain port by a specified route and is compelled to submit for approval each change of course that the vessel makes, and who has to ask for "*permission*" to change a course and receives "consent", has ceased to be the master of that ship. He has become in fact the instrument of the naval lieutenant who had been placed above him with an armed force to compel obedience.

The Petitioner lost its ship when the *Llama* was "taken, arrested and detained" and Lieutenant Cox as-

sumed control thereof, and the British Government lost its prize when the ship stranded.

That this proposition is legally sound is abundantly supported by the authorities, as we will demonstrate.

FIRST POINT.

TAKING THE SHIP INTO KIRKWALL WITH A NAVAL PRIZE CREW WAS THE ENTERPRISE OF THE ENGLISH GOVERNMENT; AND NAVIGATION OF THE SHIP AFTER THE TAKING, ARREST, SEIZURE AND DETAINMENT WAS FOR THEIR RISK AND ACCOUNT; THE LOSS OF THE SHIP WAS THE PROXIMATE RESULT OF THE ARREST, SEIZURE, RESTRAINT AND DETAINMENT.

The facts are summarized in this brief at pp. 5-17.

The risks undertaken in the policy are as follows:

> "Takings at sea, arrest, restraints and detainments of all kings, princes and peoples of what nation, condition or quality soever and all consequences of hostilities or warlike operations."

The admitted facts, it is submitted, show that there was a "taking at sea", an "arrest", a "restraint" and a "detainment".

The facts further show that as a consequence of these perils which the United States had expressly assumed, the *Llama* was taken out of the possession and control of her owner by the British Navy and destroyed while in the possession of a British Prize crew by the negligence of the Prize Officer in command.

1. If this Court should agree with the conclusion of the District Court which was concurred in by Davis, C. J., in his dissenting opinion, that the final course through the Westray Firth was suggested or ordered by Lieutenant Cox, the Petitioner is plainly entitled to a decree in its favor, because the loss of the ship would be directly due to the negligence of Lieutenant Cox as agent of a belligerent government.

2. If this Court should agree with the majority of the Circuit Court of Appeals that the loss of the ship was due to the "conjoint, but mistaken, navigation of the captain and the British officer", the Petitioner is entitled to a decree in its favor because Lieutenant Cox was in supreme control of the vessel and responsible for his own acts and the acts of the master, engineers and other members of the crew whom he made his subordinates. *Muller* v. *The Insurance Companies,* C. C. A. 2nd Circ., 246 Fed. 759.

3. In any event, the Petitioner is entitled to a decree because, under the well settled law of both the United States and Great Britain, a seizure, restraint and detainment are regarded as the proximate cause of the loss of the ship if, before being delivered from those perils, the vessel is lost for any reason and not returned to her owners. *Magoun* v. *New England Marine Insurance Company* (1840) (1 Story 157, 3 Law Rep. 127), 16 Fed. Cases 483, Fed. Case No. 8961; *Muller* v. *The Insurance Companies,* C. C. A. 2nd Circ., 246 Fed. 759; *Andersen* v.

Marten, (1908) App. Cases 334; *Goss* v. *Withers*, 2 Burr 683; *Ruys* v. *Royal Exchange Assurance Corporation*, (1897) 2 Q. B. 135; *Leyland Shipping Company, Ltd.* v. *Norwich Union Fire Insurance Society, Ltd.*, (1918) A. C. 350.

Parsons, C. J., in the Massachusetts case of *Richardson* v. *Marine Insurance Company*, 6 Mass. 101, defined "restraint and detainment", at p. 108, as follows:

> "For in this instrument I know of no difference between the import of restraint and detention. They are respectively the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained; and whenever she is detained, she is under restraint. Neither have I found a book or case, relating to insurances, in which a different construction has been given to these words."

It cannot be material that the *Llama* was intending to call at Kirkwall in any event. The expediency of calling at Kirkwall had been forced on the petitioner by the British Government. *Hand*, p. 102.

In the case of *Magoun* v. *New England Marine Ins. Co.* (1840) (1 Story 157, 3 Law Rep. 127), 16 Fed. Cas. page 483, Case No. 8961, which was a suit upon a policy of insurance against usual risks, the declaration alleged a total loss by arrest and detainment by the authorities of the Republic of New Granada, and also a total loss by perils of the seas. It seems that the schooner, when about to leave port, was seized and taken into the possession of the local authorities, on account of a supposed violation of trade regulations. It subsequently developed

at the trial that while the master was subject to penalty, the vessel was not subject to any forfeiture, and was accordingly restored to her owners' possession. Owing to her long exposure to the weather during the interim, she deteriorated and her cargo also was destroyed, whereupon the owners abandoned the vessel and freight to the underwriters, who, however, declined to accept the abandonment.

After discussing the question of proximate cause of the loss, Mr. Justice Story stated, at p. 486, as follows (italics ours):

> "All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. *If there be a capture, and before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear that the whole loss is properly attributable to the capture.* It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils. The decision of the Supreme Court of the United States in *Peters* vs. *Warren Ins. Co.* (at the last term), 14 Pet. (39 U. S.) 99, is directly in point; and in my judgment fully settles, that the *restraint and detainment under the seizure are to be treated as the proximate cause of the loss in the sense of the rule. The vessel was never delivered from that peril, until she was virtually destroyed and incapable to perform the voyage.*"

In *Muller* v. *Insurance Companies*, 246 Fed. 759, the *Canadia* was bound to Kirkwall by way of the route northward of the Orkneys and Shetlands, when she was stopped by the British cruiser *Hilary*, which sent an armed party on board and ordered the steamer to proceed by the passage between the *Orkneys* and *Shetlands*. The passage was made at night. A course was taken which should have carried the vessel clear of Fair Island by about 12 miles. This course was adopted "after consultation" between the British Naval Officer from the *Hilary* and the master of the *Canadia;* and the course was similarly changed, but, as the event proved, the change of course was premature and the *Canadia* grounded and became a total loss.

These facts are almost exactly similar to the established facts in the present case.

Suit was brought on policies of insurance protecting against war risk only, the perils insured against being substantially the same as those in the policies in question in the present case.

The Circuit Court of Appeals (2nd Circuit), affirming the decision of the U. S. District Court (S. D. N. Y.), held that the loss was due to war risk covered by the policies, and rejected the contention as to stranding being the proximate cause.

Circuit Judge Hough stated:

> "Thus we find no intervening cause, breaking the causal connection between the control assumed by the *Hilary* boarding party and the loss of the ship. There was no time when the shipmaster

was left to navigate his own ship in his own way; she was lost while he was doing what he had to do."

In *Andersen* v. *Marten*, (1908) Appeal Cases 334, suit was brought upon a policy insuring the steamship *Romulus* against loss by perils of the seas, which contained the following clause: "Warranted free from capture, seizure and detention, and the consequences of hostilties."

The *Romulus*, a German vessel, sailed during the currency of this policy, for a Russian port with a cargo of coal which had been proclaimed contraband of war. In order to avoid Japanese cruisers the *Romulus* took a circuitous course to the north and was so injured by ice that the master made for Hakodate, a Japaneses port, for refuge. Some 30 or 40 miles from that port the *Romulus* was stopped by a Japanese cruiser, and was boarded by a Japanese officer and an armed guard. The Japaneses officer ordered the master of the *Romulus* to proceed to Hoskosuka, but the vessel made much water, and altering her course went aground, and ultimately she became a total loss.

The plaintiff (appellant) claimed and it was argued that the proximate cause of the loss was a peril of the sea, and that there was not any relation back to the date of the seizure; it being contended that the *Romulus* was a neutral ship and there was not any property in the vessel until condemnation, although it was admitted that the captors had rights *in rem*.

It was argued on behalf of the defending underwriter, on the other hand, that the loss was due to "capture, seizure or consequences of hostilities" despite the immediately promoting cause, which related back to the date of seizure; and the following cases in support of this doctrine of relation back were cited: *Goss* v. *Withers*, (1758) 2 Burr, 683; *Hamilton* v. *Mendes*, (1761) 2 Burr, 1198, 1211; *Dean* v. *Hornby*, (1854) 3 E. & B. 180; *Cory* v. *Burr*, (1883) 8 A. C. 393, 398; *Ruys* v. *Royal Exchange Assurance Corporation*, (1897) 2 Q. B. 135.

The House of Lords held that there was a total loss within the exceptions of the policy when the vessel was stopped by the Japanese cruiser, and that the underwriters (on marine risk) were not liable, although the final destruction of the vessel was due to a peril of the seas.

The Lord Chancellor (Lord Loreburn) said at page 338:

> "The real question is whether there was a total loss by capture, seizure or detention, or the consequences of hostilities. I think there was in this case a total loss by capture on February 26th to say nothing of the other words, namely seizure, and so forth. That was the day on which the *Romulus* was seized lawfully, as appears by the subsequent condemnation. There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released."

Lord Halsbury agreed that there was a total loss from the time the boarding party took possession of the

Romulus, and he commented on the case of *Goss* v. *Withers,* (2 Burr. 683) at page 340, as follows (Italics ours):

> "This very quotation arose just 150 years ago in *Goss* vs. *Withers,* and was argued before Lord Mansfield, and he observed that a large field of argument had been entered into, and it would be necessary to consider the laws of nations, our own laws and Acts of Parliament, and also the laws and customs of merchants which make a part of our laws. After taking time to consider, the learned judge, delivering the judgment of the whole Court on November 23, 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected the change in property, he said: *'But whatever rule ought to be followed in favor of the owner against a recaptor or vendee it can in no way affect the case of an insurance between the insurer and insured. * * * The ship is lost by the capture though she be never condemned at all nor carried into any port or fleet of the enemy, and the insurer must pay the value.'* If after condemnation the owner recovers or retakes her the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract; *the insurer runs the risk of the insured and undertakes to indemnify.* He must therefore bear the loss actually sustained."

It is to be emphasized that the rule of relation back and right of abandonment as laid down by Lord Mans-

field in the earlier cause of *Goss* v. *Withers* (1758), 2 Burr. 683, and quoted with approval by Lord Halsbury as above, is equally applicable whether or not condemnation should follow the seizure. In other words, as between insurer and insured, the loss arises unconditionally under the policy at the moment of seizure.

Although the case of *Cory* v. *Burr* (1883), 8 A. C. 393, *supra,* involved circumstnaces which distinguish it from the present case, and the policy there contained a *warranty* "free from capture and seizure and the consequences of any attempts thereat", the decision reached applies inversely and the expressions of Lord Blackburn, in his opinion, are pertinent, in clearly stating that the loss would have been attributable to the seizure but for the exception. He said at p. 398 (Italics ours):

> "The policy here is in the ordinary Lombard Street form, which has been in use for more than a century, and contains the ordinary enumeration of the perils against the loss from which the underwriters undertake to indemnify the assured. *Many of these, as for instance men-of-war, enemies, pirates, rovers, and I may add barratry of the master and mariners, do not in themselves necessarily occasion any loss; but when by one of those the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get their property back; Dean* v. *Hornby,* 3 E. & B. 180. *There are other perils such as takings at sea, arrests, restraints and detainments of princes, which from their nature involve such a*

taking of the subject insured out of the control of the owners. That being the case, supposing there had been no warranty at all, was there a loss here which would be one for which the underwriters would be liable? Upon the facts stated I cannot doubt it."

The case of *Ruys* v. *Royal Exchange Assurance Corporation,* (1897) 2 Q. B. 135, was one in which suit was brought under a policy of insurance against war risks. The vessel had been captured by an Italian cruiser while carrying a cargo of ammunitions to Abyssinia, which was at war with Italy. A few days after the capture the plaintiffs, owners of the vessel, gave notice of abandonment. Although the vessel was later declared lawful prize, the war being at an end, she was ordered to be restored to her owners, which was done. The question then arose as to the effect of such restoration on the pending suit under the policy, and the Court held that the owners were entitled to recover as for a total loss. That case also supports the doctrine of relation back to the seizure, and the right to abandon at that moment, despite the outcome of seizure in respect of ultimate title to the vessel.

In *Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Ins. Society, Ltd.,* (1918) A. C. 350, where the steamship *Ikaria* was insured against perils of the seas with a warranty against consequences of hostilities, a suit arose by reason of the loss of the *Ikaria* after having been torpedoed by a German submarine. The *Ikaria* was placed alongside a dock in Havre, and a gale having

sprung up, she was removed inside the outer breakwater. She later sank. The question then arose as to what was the proximate cause of her loss, whether it was the original torpedoing of the vessel, or the gale. The Court held that the real cause was the torpedoing.

Lord Shaw of Dunfermline said, in discussing the proximate cause of the loss, at p. 371:

> "The vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold."

Similarly, in the present case, the *Llama* was all the time in the grip of the captor, and of its armed representatives, whose control never ceased, but efficiently caused the loss.

After the seizure, the adventure of taking the ship into Kirkwall was that of the British Naval authorities, and the risk and responsibility of it was theirs. The result was as in the case of *Andersen* v. *Marten,* (1908) A. C. 334, that the shipowners lost their ship by arrest and seizure and the captors lost their capture by stranding.

It is submitted that the loss of the *Llama* having occurred while in the possession and control of the British Government, whose acts constituted "an arrest, restraint and detainment" as "consequence of hostilities" within the meaning of the policy, the Petitioner is thereby entitled to indemnification from the respondent as for a total loss *ab initio* under the foregoing authorities.

It was contended in the Court below and the Circuit Court of Appeals found that the loss was not proximately caused by the seizure, but was the result of an ordinary sea peril not covered by the policies.

We reiterate that under the principles of the law of insurance as laid down by the cases cited above, it is immaterial as between the insurer and the insured, what might have been the immediate cause of the destruction of the vessel. Since the loss took place after the seizure and while the vessel was under the control of and in the possession of the British Governmental representatives, the loss was primarily the loss of the British Government, for which possibly it may be required to account to the United States as underwriter, when the latter has paid the amount due under the policies and becomes entitled to an underwriter's subrogation.

In considering perils and risks undertaken by an underwriter in an insurance policy in relation to the doctrine of proximate cause, it must be borne in mind that there are two kinds of perils and risks:

1. Perils which do not in themselves cause any loss or damage to a ship, but do cause a loss of a ship to the owner.

Illustrations of this class of perils are arrests, seizures, captures, piracy, etc.

2. Perils which cause a loss or damage to a ship which the owner may or may not have lost from some other peril.

Illustrations of this kind of perils are torpedoings, strandings, collisions, etc.

Thus, if a vessel has been captured as a prize by the enemy and subsequently while in possession of the captors burns up, the real situation is that the owner lost the ship by the capture, but the captor lost its prize by a fire.

Similarly, in this case the vessel having been arrested, restrained and detained, and the owner having been deprived of possession and control by operation of those perils, the loss of the vessel to the petitioner was by those perils.

It is immaterial, therefore, to the Petitioner how the ship was finally destroyed, because the vessel was lost to him when she was arrested, restrained and detained, which were perils expressly assumed by the United States in the policy.

In the courts below the United States laid great stress on *Morgan* v. *United States,* 14 Wall. 531.

The report of the *Morgan* case in this Court is so meagre that it is impossible to understand exactly what facts the Court was there dealing with.

Reference, however, to the opinions in the Court of Claims, gives a fuller report of the circumstances involved in this case.

In the report of the *Morgan* case in the Court of Claims, 5 Court of Claims Reports 182, the following facts appear:

During the Civil War, by a charter party, the owner voluntarily chartered a vessel to the United States for $182.25 for each day the vessel should be employed. The vessel was to receive on board, when tendered alongside,

such troops, men, animals, supplies and cargo as a quartermaster should direct, and proceed direct to such ports and places *as ordered by a quartermaster of the United States Army.* The charter party contained this clause:

> *"The war risk to be borne by the United States, the marine risk to be borne by the owners."*

There was no statement in the charter party that, included within the meaning of the term, war risk, were *"takings at sea, arrests, restraints and detainments of all kings, princes and peoples of what nation, condition or quality soever."*

The vessel carrying troops and stores was directed to put to sea by the orders of a quartermaster (the person authorized to give orders by the charter party). These orders of the quartermaster were given to meet what he thought the exigency of the service demanded, although the danger was obvious and the master and pilot advised against it. While crossing a dangerous bar the vessel navigated by her own master stranded and sustained damage.

The Court held that the owner could not recover for the damage under the charter party.

In the Court of Claims there were three opinions. The first was Chief Justice Casey's, with whom concurred Milligan, J. Loring, J., filed a concurring opinion. Nott, J., dissented and with him Peck, J., concurred.

Chief Justice Casey's opinion as to whether the loss was a war risk or marine risk was apparently put on the

ground that the loss could not be a war risk because the damage did not result directly or proximately at least *"from the operations of the public enemy."*

Loring, J., in concurring in the result placed his decision on the following ground:

> "I think that these facts do not show that the vessel was taken from the control of the master or that his action and discretion were overruled by the officers of the United States."

In the Supreme Court the opinion of Mr. Justice Davis partly proceeds on the ground that the owner, under the charter party, had undertaken such risks as were incident to a vessel assisting in and engaging in military operations and that might be caused by following out the orders of the Government.

At p. 535 (14 Wall.) Mr. Justice Davis said (Italics ours):

> "If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners, and not the government, must bear the loss. That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule *'causa proxima non remota spectatur' we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel. If it did, it was known to the owners when the charter-party was formed, who, with this*

knowledge, became their own insurers against the usual sea risks, and must abide the consequences of their stipulation."

The *Morgan* case is clearly distinguishable from the case at bar. The ship was there damaged while the master, navigating his own vessel, was carrying out an order given by a person authorized to do so and whom the master was apparently bound to obey under the specific terms of the charter party.

Thus, while the *Morgan* case is authority for the proposition that a charterer must perform his charter party, it is not authority for saying that a loss is not due to a restraint or detainment, when the master is compelled against his will to navigate a vessel over a dangerous bar in a situation in which possession and control of his ship have been taken from him by an armed force representing a belligerent, and where no charter party is involved in which it is specifically provided that the master shall carry out the orders of a military officer.

Since the decision of the court below this Court has decided the case of *The Napoli, Queen Insurance Company of America* v. *Globe & Rutgers Fire Insurance Company,* 263 U. S. 487.

In that case the libelant had insured certain cargo on the Steamship *Napoli,* lost by collision, against marine risks, and the respondent had insured it against war

risks. The Court was asked to assume that the exception contained in the libelant's marine policy against "all consequences * * * of hostilities or warlike operations" was co-extensive with the clause in respondent's war risk policy of liability for "acts of kings, princes and people authorized by and in prosecution of hostilities between belligerent nations."

The clauses it will be noted are wholly different from those in the case at bar.

It was contended that the loss by collision was to be attributed to consequences of hostilities or warlike operations, because the vessel had sailed under convoy and without lights "as a necessity of war". The routes and particulars of navigation were determined by a naval command. The vessel was navigated by her own captain in the convoy.

The Court held that the loss was a marine risk and declined to regard factors which had increased the marine perils as causes thereof.

It will be observed that this Court in the *Napoli* case was called upon only to construe the words, "all consequences * * * of hostilities or warlike operations."

The Court was not asked to determine, and the question was not before the Court, whether there had been a "taking at sea", a "restraint", "arrest" or "detainment", nor did the Court have before it the question of responsibility for the loss of the ship where following a

taking at sea, a restraint and a detainment the ship had been destroyed by the negligence of a British prize officer who had taken possession of the vessel and was exercising supreme dominion over it.

In the *Napoli* case the vessel had not been taken out of the owner's possession and control, and all that was decided in that case was that a collision, occurring while a vessel was traveling in a convoy, without lights, was not a consequence of hostilities or warlike operations.

In the *Napoli, Queen Insurance Company* v. *Globe & Rutgers*, 263 U. S., at page 493, the court said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, * * *"

As has been pointed out above, the decisions of the English Courts on the facts involved in this case uniformly hold that where there has been an arrest, restraint or detainment the proximate cause of the loss of the ship is held to be that arrest, restraint or detainment, if, before the ship is freed from those perils, she is destroyed by any other cause.

That this is also the law of the United States is shown by *Muller* v. *The Insurance Companies*, 246 Fed. 759 and *Magoun* v. *New England Marine Insurance Company*, (1840) (1 Story 157, 3 Law Rep. 127), 16 Fed. Cases 483, Fed Case No. 8961.

SECOND POINT.

PETITIONER IS ENTITLED TO INTEREST ON THE AMOUNT DUE UNDER THE POLICIES FROM FEBRUARY 11, 1917.

The policies in question here were issued by the Treasury Department under the Act of Congress of September 2, 1914, entitled "*An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department.*"

The preamble of the Act states its purpose as follows:

> "WHEREAS the foreign commerce of the United States is now greatly impeded and endangered through the absence of adequate facilities for the insurance of American vessels and their cargoes against the risks of war; and
>
> "WHEREAS it is deemed necessary and expedient that the United States shall temporarily provide for the export shipping trade of the United States adequate facilities for the insurance of its commerce against the risks of war:"

By Section 2 the Bureau of War Risk Insurance, subject to the general direction of the Secretary of the Treasury, was directed to make provisions for insurance by the United States against war risks.

By Section 3 the Bureau of War Risk Insurance, with the approval of the Secretary of the Treasury, was authorized to adopt and publish a form of war risk policy

and fix reasonable rates of insurance for the insurance of American vessels, their freight and passage moneys and cargoes against war risk.

By Section 4 the Bureau of War Risk Insurance, with the approval of the Secretary of the Treasury, was given power to make any and all rules and regulations necessary for carrying out the purposes of the Act.

By Section 6 the Director of the Bureau of War Risk Insurance was directed to pay all claims for losses promptly.

It will be seen from the foregoing that the United States Government, in pursuance of a policy of assisting its trade, decided to go into the business of insuring war risks in order to provide adequate facilities for the insurance of its commerce against the risks of war and the prompt payment of losses due to war risks.

In pursuance of the policy announced by the Act and in order to carry out its provisions, the United States adopted the standard form of insurance policy which had been in use by private companies for the insuring of war risks from time immemorial.

The policies in question contained the following provision:

> "In the event of loss and claim, prompt notice should be given to the Bureau of War Risk Insurance. *Claims will be paid within thirty days after complete proofs of interest and loss have been filed with the Bureau.*"

It will be observed from the foregoing that the United States entered into an express contract to pay any loss due under the policy, within thirty days after complete proofs of interest and loss had been filed with the Bureau.

The Petitioner filed its complete proof of loss with the Treasury Department on January 11, 1917, Ex. L8, p. 128. Claim was denied on March 18, 1918. Ex. L8, p. 128.

Under the express terms of the policy, therefore, the Petitioner became entitled to payment of its loss within thirty days from January 11, 1917, if entitled to payment at all.

Under the standard form of policy in question, which was adopted by the War Risk Bureau in pursuance of express authority conferred on it by the Act, all private underwriters are obliged to pay interest on the amount of the loss when the loss is not paid within the time allowed by the policy.

The purpose of Congress, as stated in the Act which created the War Risk Bureau, was to provide war risk insurance for American commerce and for the prompt payment of losses thereunder. It must be obvious that this purpose is not carried out and the assured is not compensated by way of insurance if he receives payment for his loss ten years after the loss occurred.

This is not a claim for interest due to delay in the voyage, but for damages for breach of an express contract, to wit: to pay that loss at a specified time.

The claim is for damages of which interest is the proper measure.

The Petitioner is as much entitled to damages for the failure of the United States to pay the loss at the stipulated time as it would be to damages for any other breach of the agreement.

This Court has held that where the United States is obligated to pay a claimant "Just Compensation", the claimant, even in the absence of statute, is entitled to interest between the time the property is taken and the time the value thereof is paid. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299. The theory is, of course, that compensation, payment of which is postponed, cannot be just unless interest is allowed during the time when the claimant is deprived both of the property taken and the use of its value.

Similarly, the United States does not fulfill its obligation to insure a claimant against a loss if it fails to pay the claimant for the loss at the proper time. The very nature of insurance, as well as just compensation, requires prompt payment, or, failing that, such additional allowance of money in the form of interest as will put the claimant in the position in which he would have been if the amount due had been paid at the proper time.

In the Court below the United States did not dispute that interest is payable against the United States when authorized by statute, or where there is an agreement on the subject. It sought to avoid the payment of damages for its breach in failing to pay at the time it contracted to pay under the following warranty contained in the policies (Italics ours):

> "Warranted *free from any claim for interest,* loss of market or damage by deterioration *due to delay.*"

This is the usual clause inserted in all war risk policies to provide against any claim for interest as a direct loss under the policy *due to delay in the voyage.* Similarly the warranty protects the insurer against claims under the policy for loss of market *due to delay* in the voyage, or for damage by deterioration *due to delay* in the voyage.

The warranty does not mean, as claimed by the United States, that interest is not to be paid on an admitted loss under the policy when that loss is not paid at the time stipulated in the policy. The warranty simply excludes as losses under policy a direct claim for interest as a loss under the policy because the voyage is delayed.

It is submitted that the clause of the policy here applicable is that which reads:

> "Claims will be paid within thirty days after complete proofs of interest and loss have been filed with the Bureau."

The United States having breached its express contract to pay the loss on February 11, 1917, the Petitioner is entitled to damages for that breach measured by interest at the rate of six per cent.

It is preposterous to suppose that the warranty cited by the United States was intended to afford it immunity from an obligation expressly assumed in its agreement to pay the loss at a specific time.

The Petitioner therefore is entitled to the following sums:

Total loss of the SS. *Llama* on Certificate No. 1263	$115,000.00
With interest at the rate of 6% from February 11, 1917.	
Total loss of the freight and advances on said vessel under Certificate1269	44,686.82
With interest from February 11, 1917, at 6%.	
Expenses incurred by libelant under sue and labor clauses under Certificates Nos. 1263 and 1269, in accordance with the agreement of counsel, p. 106	2,270.34
With interest from February 11, 1917, at the rate of 6%.	

LAST POINT.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT SHOULD BE REVERSED, AND THE FINAL DECREE OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, SHOULD BE REINSTATED WITH A MODIFICATION SO AS TO ALLOW THE PETITIONER THE SUM OF $2270.34 FOR SUE AND LABOR EXPENSES INSTEAD OF $2751.97; AND WITH THE FURTHER MODIFICATION SO AS TO PROVIDE FOR INTEREST AT THE RATE OF SIX PER CENT. FROM FEBRUARY 11, 1917, TO THE DATE OF PAYMENT, WITH COSTS.

Respectfully submitted,

CLETUS KEATING,
JOHN M. WOOLSEY,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

STANDARD OIL COMPANY OF NEW JERSEY, petitioner, *v.* UNITED STATES OF AMERICA, RESPONDENT. } No. 549.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

This record presents questions of fact only. They relate to the application of the doctrine of proximate cause—always a question of fact; in law cases a question for the jury to determine. The tanker *Llama* was lost by stranding (an ordinary marine peril) brought about by errors of navigation on the part of ship officers directing her navigation (also an ordinary marine peril). The stranding occurred in broad daylight, under the best of weather and sea conditions, and while the vessel was navigating an open seaway four miles in width. The Circuit Court of Appeals, after determining these facts, reached the only conclusion warranted—that the loss of the *Llama* was due to marine casualties and had no relation to war risks.

The Government must dissent from the statement of facts and conclusions which the petition and brief suggest. They must be based on some misconception of the findings and conclusions of the Circuit Court of Appeals. Therefore the majority opinion of the Circuit Court of Appeals is now excerpted so that the facts as found by that Court can be forcefully brought to the attention of this Court. They confirm the accuracy of the Government's observations and review.

> Inquiring as to the questions involved in this case, we note that as the owners of the *Llama* assumed all marine risks and as she was lost by stranding, a marine peril, and as such stranding was caused by errors in navigation, also a marine peril, the question involved is whether the insured has shown that the proximate cause of the loss was not these marine perils or errors in navigation and stranding but was a war peril insured against, namely, "takings at sea, arrests, restraints, and detainments of all Kings, princes, and peoples, of what nation, condition, or quality soever, and all consequences of hostilities or warlike operations."
>
> The *Llama* sailed from New York for Copenhagen on October 14, 1915. She was routed "via Kirkwall," pursuant to a prior arrangement made by her owner, the Standard Oil Company, so that her documents could be examined. In pursuance thereof, and as had been done on a previous voyage of the *Llama*, she was, on October 29, 1915,

hailed and stopped by the British cruiser *Virginia*, and boarded by a lieutenant and four men. After the examination of her papers, which showed the vessel was duly routed "via Kirkwall," the *Llama* proceeded, the lieutenant and his party remaining on board. He had been directed by the *Virginia* to see that the *Llama* keep north of Scule Skerry and North Rona, well known landmarks, and not to pass between the islands at night.

Subject to these general directions, *the captain of the "Llama,"* as would appear from the absence from the log of anything indicating a departure from his previous conduct, *laid off, entered all courses, and gave directions.* * * * The log entries contain the usual recital by name of the ship's officers on watch and of the ship's men on the look-out. Other than the above the log contains no entry or reference to the cruiser or of the officer and his men aboard the *Llama*. The entry of the 30th records that on that night North Rona was reached, viz, "10.35 North Rona abeam, dist. off 9'," where the *Llama* hove to for the night at the Noup Head. From Noup Head there were two courses to Kirkwall, one called the Fair Island passage; the other, which the *Llama* took, was called the Westray Firth. The proofs show that the master of the *Llama* had taken this latter passage on the previous voyage, and that the British officer on board had never taken it. (Italics ours.)

On the next morning while the *Llama* proceeded through the Westray Firth, where there was an open leeway of some four miles, she struck a submerged but charted reef and stranded. The time was daylight, and the sea conditions, as shown by the log, were "moderate sea, clear"; and the entry in the log "9.07 Struck a reef in Westray Firth."

* * * * *

From the above extracts it will appear that the loss of the *Llama*, as made out by contemporaneous written statements of her log and officers, was due to a marine peril, to wit, "a submerged and uncharted rock," and that when the ship was struck, the vessel was holding a course *"which was considered safe by the Master," and that "it could not have been avoided."* The physical fact being that the boat was lost by reason of its stranding, and stranding being prima facie a marine peril, it follows the burden is on the ship's owner to show that the stranding was caused by one of the war risks insured against as heretofore quoted; *Monroe* v. *War Risk Ass'n*, 34 Times L. R. 331. This burden, the Court below was of opinion the insured met, finding in substance that at the time of the stranding the *Llama* was controlled and navigated by the British lieutenant who boarded her. (Italics ours.)

After a study of the proofs, we reach a conclusion different from that of the Court below, and that in the light of the facts and law the libel should be dismissed.

* * * * *

If these several statements be accepted as a true and full account of the stranding, we have here a loss from a marine peril and resulting from following a course in which both the captain and the British officer concurred. *They suggest no dominating control, no superseding of the captain by the British officer, but, on the contrary, the selection of the course by the captain*, and the justification of that selection by the concurrence of the British officer, and so regarded we have the case of a peril and a loss due, not to a war risk, but to a marine peril, for the concurrence of the two men in the course was not something done by stress of war, but at most by the concurrent mistake of two men who were attempting to safely navigate a ship through an open fairway, but who mistakingly stranded her on a submerged, unknown reef. Taken at its most, *the captain thought he was right, the British officer thought the captain was right*, but in point of fact both were wrong. There was nothing partaking of war in the ship going on a submerged, uncharted rock owing to the miscalculation of those directing her course, and therefore the cause of the loss, viz, the stranding, the marine character of the peril, is not affected by the one directing the course, whether his or their uniforms were those of a mariner or a naval officer. The stranding was the dominant causal factor of the loss; and that stranding, if the contemporaneous evidence as to the loss be accepted, resulted from the conjoint, but mistaken,

navigation of the captain and the British officer. (Italics ours.)

* * * * *

When to this is added the fact that the captain had taken the *Llama* through the Westray Firth before, but the British officer had never been through it; *that the captain admits that when the officer came aboard he made no statement that he himself was to navigate the vessel or gave any instructions to his own men that they were to do so;* * * * and in further view of the testimony of the British officer that he did not oust the captain's control over the navigation of the ship, we are clear that *the libellant has not met the burden resting upon it of showing that the causa causans of the loss was a war risk and not a marine one.* (Italics ours.)

* * * * *

The view we have taken of the situation, namely, *that the libellant has not satisfied us that the "Llama" was being navigated by the British officer, when she stranded,* renders it needless to refer to the many authorities cited, all of which have had our careful examination. (Italics ours.)

The controlling factors are that owners had routed the *Llama* via Kirkwall under prior arrangement with the British Government. The vessel was bound there at time of stranding. After boarding, the *Llama* was navigated by her master, who plotted and set all courses. The stranding (marine peril) was brought about by faulty navigation of ship officers—failure to observe landmarks, pursuing a course too

near the shore line, failure to keep a proper lookout (all marine perils). The loss of the *Llama* resulted proximately from marine perils.

While the loss happened October 20, 1915, the proofs of loss were not filed until January 11, 1917, and the present proceedings were not instituted until May 5, 1919.

THE LAW.

The substantial questions thus presented being questions of fact—the application of the principles of proximate cause—it is doubtful if any analysis of the decisions is necessary. The conclusions reached by the Circuit Court of Appeals find full affirmance in several opinions of this Court:

> *Morgan* v. *United States*, 81 U. S. (14 Wall. 531): (1) Military order of United States officer against protest of master and of United States Government pilot in charge—War peril—caused (2) stranding—marine peril. Held proximate cause was (2) stranding.
>
> *Leary* v. *United States*, 81 U. S. (14 Wall. 607): (1) Military order of United States Army officer—war peril or extraordinary marine peril—caused (2) stranding—ordinary marine peril. Held proximate cause was (2) stranding.
>
> *Reybold* v. *United States*, 82 U. S. (15 Wall. 202): (1) Military order of United States Army officer—war peril—caused (2) shipwreck in ice floe—marine peril. Held proximate cause was (2) shipwreck.
>
> *Columbia Insurance Company* v. *Lawrence*, 10 Peters (U. S. Sup. Ct.) 507: (1) Negli-

gence—caused (2) fire. Held proximate cause was (2) fire.

It also finds full confirmation in the most recent English cases where the subject has been discussed:

The Matiana—House of Lords—England—1920: 36 L. T. R. 791: (1) Military order permitting no discretion of Master of vessel—war peril—caused (2) stranding—marine peril. Held proximate cause was (2) stranding.

The Petersham—House of Lords—England—1920: 36 L. T. R. 791: (1) Military order permitting no discretion of master of vessel—war peril—caused (2) collision—marine peril. Held proximate cause was (2) collision.

It is observed that the loss of the *Llama* happened while the *Llama* was pursuing a course selected by her master. The British armed guard (not prize crew) gave no orders. *Any general directions given by the cruiser previously then had been fully complied with and related to courses which the Llama would have taken in any event.*

There is no conflict of decisions.

Petitioner suggests that the present decision is in conflict with the opinion of the Circuit Court of Appeals for the Third Circuit in the case of *Mueller* v. *Globe & Rutgers Fire Insurance Company*, 246 Fed. 759. There can be no doubt that the present decision is in full accord with the principles stated by this Court in the cases cited above. The Government suggests there is no conflict in the decisions of the Circuit Court of Appeals. *The application of the*

doctrine of proximate cause was the controlling factor in the Mueller case. The facts there were that the British officers required the master of the steamship *Canadian* in the night time, when shore lights were extinguished, to pursue a definite and dangerous course, proximately causing the stranding. The Court in the Mueller case said (page 762):

> The second contention herein raises ultimately the question of proximate cause. * * * Proximate cause is a question for the jury. * * * Thus we find no intervening cause breaking the causal connection between the control assumed by the "*Hilary*" boarding party and the loss of the ship. *There was no time when the master was left to navigate his own ship in his own way.* She was lost while he was doing what he had to do. (Italics ours.)

In our case the master was left to navigate his ship (*Llama*), selecting her course, charting the same, and navigating his ship as he believed safety required. The *Llama* was lost in broad daylight while proceeding down a fairway four miles wide under the best weather conditions and while following a course laid down by her master with sailing instructions under his direction.

The Government has examined the briefs filed in the case of *The Queen Insurance Company of America* against *The Globe & Rutgers Fire Insurance Company*, October Term, 1923, No. 116, in which case this Court has granted an application for certiorari.

The facts and history of that case being so different from the facts and status of the present case, the Government confidently observes such case can have no relation to the questions which the present application properly may suggest.

The final observation made by the Government is that in all the cases cited by the petitioner as interpreting and applying the "seizure" or "detainment" clauses in war-risk insurance policies, at the time of the seizure or detainment, the owners and masters were deprived of authority and control over their vessel by the captors. In most of the cases at the time of seizure or detainment, formal declaration of seizure was made. In our case the master and owner were not deprived of authority and control over the *Llama*, and the loss happened through stranding while the *Llama* was being navigated by her master. *The act of boarding without control could not be characterized as a seizure or detainment. Even if there be seizure or detainment within the meaning of the policy, which is denied, the ultimate finding must rest upon the application of the question of proximate cause, which the Court has resolved in favor of the Government.*

CONCLUSION.

The Government denies the record in this case suggests many of the questions which petitioners advance. The flat question presented is the application of the doctrine of proximate cause. The Circuit Court of Appeals has consistently ruled properly.

Unless this Court believes it should vary its settled practice to decline to review cases presenting fact questions, the present application should be denied.

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